85-521

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., APPELLANTS

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

STATE OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Section 103(a) of the Social Security Amendments Act of 1983, 42 U.S.C. (Supp. I) 418(g), effected a "taking" of property within the meaning of the Fifth Amendment by preventing states from withdrawing from the Social Security System.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, plaintiffs in the district court were the Yorba Linda Library District, the North Bakersfield Recreation and Park District, the Delano Mosquito Abatement District, Katherine T. Citizen, William Rasmussen, and Margie Hunt. Defendants in the district court included, in addition to the parties named in the caption, John Svahn. Named as "real parties in interest" were George Deukmejian, Michael Franchetti, the Board of Administration of the Public Employees Retirement System of the State of California, Robert F. Carlson, Bill D. Ellis, Jake Petrofino, Prescott R. Reed, Wilson C. Riles, Jr., Mel Reuben, Jack G. Willard, Brenda Y. Shockley, and Susan Tohbe.

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OPINION BELOW

The opinion of the district court (App., *infra*, 1a-35a) is reported at 613 F. Supp. 558.

JURISDICTION

The judgment of the district court (App., *infra*, 36a) was entered on May 31, 1985. A notice of appeal (App., *infra*, 37a-38a) was filed on June 27, 1985. On August 19, 1985, Justice Rehnquist extended the time for docketing the appeal through September 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. 418(a)(1) provides in relevant part:

> The Secretary of Health and Human Services shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof.

42 U.S.C. (Supp. I) 418(g) provides:

> No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983.

42 U.S.C. 1304 provides:

> The right to alter, amend, or repeal any provision of this chapter is hereby reserved to Congress.

The Fifth Amendment to the Constitution provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

1. The Social Security Act, 42 U.S.C. (& Supp. I) 301 *et seq.*, exempts state and local government employees from mandatory participation in the Social Security System (the System). 42 U.S.C. 410(a)(7). In 1950, however, Congress amended the Act to permit the states to enroll their employees, and those of their political subdivisions, in the System. Social Security Act Amendments of 1950, ch. 809, § 106, 64 Stat. 514, codified at 42 U.S.C. (& Supp. I) 418. Specifically, Section 418 authorizes the Secretary of Health and Human Services (the Secretary), "at the request of any State, [to] enter into an agreement with such State for the purpose of extending the [Social Security] insurance system * * * to services performed by individuals as employees of such State or any political subdivision thereof." 42 U.S.C. 418(a)(1).

Pursuant to these so-called "Section 418 agreements"—which must "contain such provisions, not inconsistent with the provisions of this section, as the State may request" (42 U.S.C. 418(a)(1))—participating states may enroll all, or only limited "coverage groups," of their employees. 42 U.S.C. 418(c). See 42 U.S.C. 418(b)(5). Participating states are responsible for collecting and periodically paying to the Secretary of the Treasury "amounts equivalent to the sum of taxes" that would be due if their employees (or those of their political subdivisions) otherwise were covered by the Act (42 U.S.C. (Supp. I) 418(e)(1)(A)), and the other requirements imposed upon the states generally are the same as those placed on private employers by the Act. See 42 U.S.C. 418(i). The Secretary of Health and Human Services may impose penalties for late payment. 42 U.S.C. 418(j). The statute also makes

provision for the assessment of amounts due (42 U.S.C. 418(q)), for the administrative determination of challenges to assessments and claims for refunds (42 U.S.C. 418(s)), and for judicial review of such determinations (42 U.S.C. 418(t)).

Following enactment of Section 418, all 50 states executed agreements with the Secretary to obtain Social Security coverage for their own employees or for those of their political subdivisions.[1] And the percentage of state and local employees enrolled in the System through Section 418 agreements increased dramatically, from 11% in 1951 to 70% in 1970. Subcomm. on Social Security of the House Comm. on Ways and Means, 97th Cong., 2d Sess., *WMCP: 97-34, Termination of Social Security Coverage for Employees of State and Local Government and Nonprofit Groups* 25 (Comm. Print 1982) [hereinafter cited as H.R. Comm. Print 97-34]. The percentage of such employees covered by Section 418 agreements has remained roughly constant since then (see H.R. Comm. Print 97-34, at 25); as of 1983, some 9.4 million of the approximately 13.2 million state and local government employees were participants in the Social Security System. H.R. Rep. 98-25, 98th Cong., 1st Sess. Pt. 1, at 17 (1983).

2. As originally enacted, Section 418 provided that a participating state could elect to terminate its Section 418 agreement, in whole or in part, upon two years' notice to the Secretary. 42 U.S.C. 418(g).[2]

[1] Only five states—Alaska, Maine, Massachusetts, Nevada, and Ohio—currently do not have their own employees enrolled in the Social Security System. See H.R. Rep. 98-25, 98th Cong., 1st Sess. Pt. 1, at 17 (1983).

[2] States alone were given the authority to file notices of withdrawal, although they could do so on behalf of local governments.

During the statute's first two decades of operation, virtually no states or subdivisions chose to withdraw from the System. H.R. Rep. 98-25, *supra*, at 18; H.R. Comm. Print 97-34, at 26.[3] From 1977 on, however, the number of withdrawals increased significantly. Between 1977 and 1981, 96,000 state and local government employees were withdrawn from the System; by 1983, termination notices were pending for 634 state and local entities representing an additional 227,000 employees. H.R. Rep. 98-25, *supra*, at 18.

In that year, Congress determined that the continued and accelerating withdrawal of employees by states and localities was threatening the integrity of the Social Security System. It noted that withdrawals at the current rate would cost the Social Security trust funds $500 million to $1 billion annually. H.R. Comm. Print 97-34, at 13-14. And it concluded that permitting states and localities to terminate Social Security participation for their employees was inequitable both for the workers who lost coverage and for the employees who continued to pay into the system. H.R. Rep. 98-25, *supra*, at 18-19.

As part of the Social Security Amendments Act of 1983, Pub. L. No. 98-21, § 103(a), 97 Stat. 71, Congress accordingly amended Section 418(g) to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983."[4]

[3] Indeed, from 1950 through 1966, 23 public entities representing a total of only 319 employees withdrew from the System. H.R. Comm. Print 97-34, at 26.

[4] Prior to this amendment, the Secretary was authorized to terminate a Section 418 agreement upon finding that the state involved was unable to comply with the agreement or with the Act. 42 U.S.C. 418(g)(2). The statute also provided that

This amendment prevents a state from withdrawing its employees from (or those of its political subdivision) from the Social Security System even if a two-year termination notice had been filed prior to 1983 and was pending at the time that Section 418 was modified.[5]

3. At the time of the 1983 amendment to Section 418(g), appellee State of California—which has had a Section 418 agreement with the Secretary since 1951 (App., *infra*, 4a)[6]—had filed termination notices on behalf of approximately 70 of its political subdivisions with some 34,000 employees.[7] Those

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an agreement, once terminated, could not be renewed. 42 U.S.C. 418(g)(3). Both of these provisions were eliminated by the 1983 amendment.

[5] Prior to 1983, employees of certain types of nonprofit organizations were excluded from the Social Security System unless the employing organization filed a certificate waiving its exemption from the System. 42 U.S.C. 410(a)(8)(B). Pursuant to such waivers, approximately 80% to 90% of the 5.3 million employees of nonprofit organizations participated in the System. H.R. Rep. 98-25, *supra*, at 15. Like state governments, however, nonprofit institutions were permitted to withdraw from the System upon two years' notice, and in 1983 termination notices were pending for 977 such organizations with 322,600 employees. In 1983, Congress accordingly made coverage for such employees mandatory by including them within the Act's basic definition of "employee." See Pub. L. No. 98-21, § 102(a)(1), 97 Stat. 70.

[6] California in turn enacted legislation permitting it to enter into agreements with public agencies that wished to participate in the System; these entities were to contribute their share of contributions to the State, and were to be permitted to ask the State to withdraw them from the System upon two years' notice to the State. See App., *infra*, 5a.

[7] The State did not seek to withdraw its own 100,000 employees from the System.

employees were to have been withdrawn from the System at the end of the year. The 1983 amendment, however, prevented the notices from taking effect.

In response to this development, these suits were brought in the United States District Court for the Eastern District of California to challenge the validity of amended Section 418(g). The first action was filed by one set of appellees—several public agencies of the State of California, their employees, local taxpayers, and a group called "Public Agencies Opposed to Social Security Entrapment" (POSSE)—who contended, in part, that the amendment deprived them of their contract rights without according them due process or just compensation. App., *infra*, 9a-10a. The second suit was filed by the State of California, which claimed that Section 418(g) infringed the State's contract and violated the Tenth Amendment by impairing the State's ability to structure its relationships with its employees. App., *infra*, 10a-11a. Both sets of appellees sought injunctive relief.

The district court ruled for appellees.[8] In the court's view, Section 418 agreements are contracts and thus "property" within the meaning of the Fifth Amendment's Takings Clause. App., *infra*, 20a, 30a-31a. Similarly, the court found that the ability to terminate an agreement on two years' notice, which appeared in the original version of Section 418(g) and was echoed in California's Section 418 agreement (see App., *infra*, 4a-5a), "is a contractual right running in favor of the public agencies." *Id.* at 21a. While the court assumed that Congress would have

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[8] The court first ruled that it had jurisdiction, finding that all of the appellees had standing and that the Anti-Injunction Act, 26 U.S.C. 7421(a), was inapplicable. App., *infra*, 11a-24a, 26a-28a.

the authority to divest the State of its right to withdraw "if the right existed solely by virtue of the statute," here the ability to withdraw from the Social Security System "draws its independent existence from the plain terms of the contract." The court therefore held that "Congress is simply not free to deprive the State of its contractual right without just compensation." App., *infra*, 31a-32a (footnotes omitted).

Although the district court thus found that the 1983 amendment to Section 418(g) effected a taking of property, it concluded that it was not free to order payment of just compensation or to refer the case to the Claims Court for the award of that relief. The court reasoned that the purpose of the 1983 amendment was to "ensure an adequate financial basis for [the Social Security] system by requiring the states and their public agencies to contribute to the system," so that "requir[ing] the United States to pay just compensation by making the contribution for the public agencies is simply and clearly contrary to the will of Congress." App., *infra*, 34a. The court therefore declared the amendment void, and ordered the Secretary to "accept the notifications of withdrawal properly tendered to her." *Id.* at 35a.

THE QUESTION IS SUBSTANTIAL

The district court has invalidated a central portion of a legislative package that was designed to "assure the solvency of the Social Security Trust Funds" while correcting a significant "inequit[y]" in the Social Security System. H.R. Rep. 98-25, *supra*, at 1, 18. The importance of its decision is manifest. It will have an immediate effect on the 227,000 state and local government employees whose employers attempted to withdraw from the System as of 1984;

if their coverage is terminated, a great many of these employees will be left with inadequate pension and insurance guarantees, while others—whose rights in the System already have vested—will obtain windfall payments. Similarly, the decision may affect the pension rights of more than 9 million other state and local government employees, whose participation in Social Security (under the district court's ruling) may be terminated upon two years' notice at the election of their employers. And the financial impact on the System of the district court's decision is immense: if withdrawals are permitted to continue at their current pace, the Social Security trust funds will lose between $500 million and $1 billion annually (H.R. Comm. Print 97-34, at 13-14), with an aggregate loss of well over $3 billion for the 1983-1989 period. S. Rep. 98-23, 98th Cong., 1st Sess. 154 (1983). Because the decision below misreads Section 418 and misapplies the law of "takings," plenary review by this Court plainly is warranted.[9]

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[9] Appellees asserted that the district court had jurisdiction under 28 U.S.C. 1331, 1346, 1361, 2201 and 2202; the court assumed jurisdiction over the claims of all appellees without identifying the jurisdictional basis. In our view, however, jurisdiction to challenge implementation of the Act must be provided by the Act itself. See 42 U.S.C. 405(h); *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 11-12; *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) Cf. *Brown* v. *GSA*, 425 U.S. 820 (1976). Here, that jurisdiction is provided as to California by 42 U.S.C. 418(t), which permits state participants in the System to challenge the Secretary's determinations about amounts owed. California clamed that it had a right to withdraw certain employees from the System, and thus to cease making contributions on their behalf; the Secretary denied that claim. The Secretary has treated this exchange as a final decision on a challenge to an assessment, and

1. The district court grounded its holding on the assumption that Section 418 agreements represent run-of-the-mill contractual relationships between the state and federal governments, with each side holding vested property rights. That assumption, however, fundamentally misunderstands the nature of Section 418 and of the agreements consummated under its authority.

Section 418 agreements do not involve arms-length negotiation with each side attempting to obtain the "benefit of the bargain"; instead, Congress created the agreement mechanism simply as a convenient method of making the benefits of enrollment in the Social Security System available to state and local government employees. See S. Rep. 1669, 81st Cong., 2d Sess. (1950). Section 418 thus constitutes a social welfare program essentially universal in its application, rather than "a contractual arrangement." *National Railroad Passenger Corp.* v. *Atchison, T. &*

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has determined not to insist on further recourse to administrative remedies because no facts are in dispute and "the relief that is sought is beyond [her] power to confer." *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976). See *Salfi*, 422 U.S. at 766-767.

While the district court thus had authority to decide the case, we note that none of the POSSE plaintiffs was properly before the court. The individuals could challenge a dispute about application of the Act only under 42 U.S.C. 405(g); because none of them filed a complaint or a request for the correction of records (see 42 U.S.C. 405(c)) with the Secretary, the court lacked jurisdiction to consider their challenge. See, *e.g.*, *Eldridge*, 424 U.S. at 329. And Section 418(t) provides a remedy only for states (which are the only Section 418 employers to deal directly with the Secretary), not for political subdivisions. See note 2, *supra*.

S.F. Ry., No. 83-1492 (Mar. 18, 1985), slip op. 14. And when Congress establishes such a legislative program, "the presumption is that '[it] is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Ibid.* (quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937)). See *Rector of Christ Church* v. *County of Philadelphia*, 65 U.S. (24 How.) 300, 302 (1861).

"[L]est there be any doubt in this case about Congress' will" (*National Railroad Passenger Corp.*, slip op. 16), the statute from the outset expressly has reserved to Congress "[t]he right to alter, amend, or repeal any provision of [the Act]." 42 U.S.C. 1304. For over a century, the Court has "recognized the effect of these few simple words" (*National Railroad Passenger Corp.*, slip op. 16 n.22): "through the language of reservation 'Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments * * * as come within the just scope of legislative power.'" *Ibid.* (quoting the *Sinking-Fund Cases*, 99 U.S. 700, 720 (1879)). Legislation containing such a provision hardly can give rise to static property interests.

It is true, of course, that the Section 418 program makes use of written agreements, a consideration that the district court evidently found determinative (see App., *infra*, 31a-32a). But there is no talismanic significance to the existence of a separate writing signed by a representative of the federal government. Congress provided that the states could join the Social Security System by means of individual agreements in an attempt to "*permit*[] [them] to play a

continued role" (*FERC* v. *Mississippi*, 456 U.S. 742, 765 n.29 (1982)) in the pension field; states may enroll certain coverage groups so as to preserve their existing pension systems, and may include in their agreements any provisions that are not inconsistent with the Act. See H.R. Comm. Print 97-34, at 20; S. Rep. 1669, *supra*. Congress reasoned that this approach would "extend coverage as quickly and with as little difficulty as possible to those employees who needed it most." H.R. Rep. 98-25, *supra*, at 19. It would turn this aim on its head, however—and ultimately would disserve state interests—to conclude that attempts to accommodate the states in federal regulatory programs give rise to contractual relationships that make changes in those programs impermissible.

In any event, Section 418 agreements have none of the indicia of typical contracts. Their purpose is not a parochial one related to the self-interest of the parties; instead, the agreements make available to individual workers the benefits of participation in a generally applicable social welfare program. The implementation of the agreements is subject to regulations promulgated by the Secretary. 42 U.S.C. 418(i). And the Act makes provision for administrative and judicial review of challenges to assessments and payments (42 U.S.C. 418(s) and (t)) in a manner that parallels those applicable to most federal programs. Section 418 agreements thus do not create obligations of the sort that have ever been found to be binding on the federal government. Compare, *e.g.*, *Perry* v. *United States*, 294 U.S. 330 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934).

2. Even if Section 418 agreements are in some sense thought to be contracts, "Congress simply can-

not be presumed to have nonchalantly shed [the] vitally important governmental power" to make basic modifications in the Social Security System through legislative change. *National Railroad Passenger Corp.*, slip op. 17. The district court assumed that Congress has the power to modify Section 418 *itself* to eliminate the *statutory* termination provision, but held that the existence of written agreements freezes the relationship between the United States and state participants in the System (App., *infra*, 31a-32a). The court failed to recognize, however, that "sovereign power even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982). See *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573, 590-593 (1938). Thus, "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign * * * unless [the sovereign's ability to enact such legislation] 'has been specifically surrendered in terms which admit of no other reasonable interpretation.'" *Jicarilla Apache Tribe*, 455 U.S. at 147-148 (quoting *City of St. Louis* v. *United Rys.*, 210 U.S. 266, 280 (1908)).

That Congress did not bargain away its authority to modify essential elements of the Social Security System is plain. As noted above, the Act contains an express reservation of congressional authority to modify any of the Act's provisions. And this Court repeatedly has noted that the survival of the System requires

> flexibility and boldness in adjustment to ever-changing conditions * * *. It was doubtless out of an awareness of the need for such flexibility that Congress included in the original Act, and

> has since retained, a clause expressly reserving to it '[t]he right to alter, amend, or repeal any provision' of the Act. That provision makes explicit what is implicit in the institutional needs of the program.

Flemming v. *Nestor*, 363 U.S. 603, 610-611 (1960) (citations omitted). Cf. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 174 (1980); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979); *Richardson* v. *Belcher*, 404 U.S. 78, 80-81 (1971). It is hardly likely, then, that Congress would have "abandoned its sovereign power" (*Jicarilla Apache Tribe*, 455 U.S. at 146) to adjust, through legislation, the Social Security obligations of state and local employers.[10]

On close examination, in fact, it is evident that Section 418 agreements cannot impose an independent check on Congress's exercise of its sovereign authority. Neither Section 418 nor any individual agreements, for example, contain a provision permitting the United States to terminate the Social Security coverage of state and local government employees. See note 4, *supra*. Yet if Congress were to eliminate the System altogether, it is difficult to imagine that the federal government would be obli-

[10] Even if the situation here is viewed in conventional contractual terms, agreements between the Secretary and the states must be read consistently with controlling provisions of law. *United States* v. *Erika, Inc.*, 456 U.S. 201, 211 n.14 (1982). Those provisions, of course, include 42 U.S.C. 1304. Cf. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 435 (1934) ("[n]ot only [is] existing law[] read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into [the] contract[] as a postulate of the legal order"); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 19-20 n.17 (1977)).

gated by the existing agreements to continue paying Social Security benefits to those (and only to those) employees. To the contrary, this Court has remarked in similar circumstances that "a revenue bond might be secured by the State's promise to continue operating the facility in question; yet such a promise surely would not likely be construed to bind the State never to close the facility for health or safety reasons." *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 (1977).

If Congress has not surrendered its ability to modify the System itself (as distinct from individual Section 418 agreements), the artificiality of the district court's approach becomes clear. Congress could have ignored the outstanding agreements and simply enacted new legislation bringing into the Social Security System those state and local government employees who already are covered.[11] And if Congress retained the authority to take such action, it seems absurd to suggest that it surrendered the power to modify the existing Section 418 agreements to achieve

[11] Making continued participation in the System mandatory only for workers who already are covered plainly is rational. Expanding coverage to workers outside the system would mean displacing existing pension systems. H.R. Comm. Print 97-34, at 18. And the rights of employees currently making Social Security payments may have vested; permitting them to withdraw may entitle them to benefits even though they no longer would be paying a portion of their wages into the System. H.R. Rep. 98-25, *supra*, at 19. See generally *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958) (citation omitted) ("'[f]ederal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution'"); *Califano* v. *Webster*, 430 U.S. 313, 321 (1977); *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970).

the same result. Indeed, the legislative history indicates that Congress believed that it was, effectively, acting to expand the Social Security System when it amended Section 418(g). It made no reference to the modification of contractual rights; instead, it declared flatly that it was "prohibit[ing] State and local governments from terminating Social Security] coverage for their employees." H.R. Rep. 98-25, *supra*, at 19; S. Rep. 98-23, *supra*, at 5. That Congress found it most efficacious to take this step by making existing agreements nonterminable, rather than by, in terms, making participation in the System mandatory, cannot have independent constitutional significance.

3. a. The district court did more than misread Section 418; even granting the court's assumption that Section 418 agreements are contracts of a conventional sort, it erred by disregarding this Court's decisions on the validity of laws that affect preexisting contractual obligations.[12] As the Court explained last Term, when a contract is impaired by federal legislation, "the judicial scrutiny [is] quite minimal" (*National Railroad Passenger Corp.*, slip op. 21): to make out a constitutional violation, the complaining party must demonstrate " 'that the legislature has acted in an arbitrary and irrational way.' "

[12] At the outset, it is far from clear that a "takings" analysis is appropriate in this case at all. The Constitution's guarantee of just compensation is " 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123 (1978) (citation omitted). Here, however, Congress has acted to ensure that the vast bulk of the workforce (and the Nation's employers) obtain the *same* benefits and are subjected to the *same* obligations.

Pension Benefit Guarantee Corp. v. *R.A. Gray & Co.*, No. 83-245 (June 18, 1984), slip op. 10 (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). See *National Railroad Passenger Corp.*, slip op. 21, 25; *Norman* v. *Baltimore & O.R.R.*, 294 U.S. 240, 307-308 (1935).[13]

The challenged legislation at issue here is unquestionably rational: it helped secure the solvency of the Social Security System, while both protecting the interests of state and local government employees and preserving public confidence in the System as a whole. As Congress explained, the "voluntary coverage provision can be seen as an anomaly in the context of a basically mandatory system." H.R. Rep. 98-25, *supra*, at 19. And many employees covered by Section 418 agreements—in particular, those whose coverage had not vested at the time of termination, who change jobs frequently, or who have low incomes—faced the prospect of significant injury when their employers "file[d] for withdrawal in sig-

[13] In *National Railroad Passenger Corp.*, the Court reserved the question whether "an allegation of a governmental breach of its own contract warrants application of a more rigorous standard." Slip op. 20. However the Court answers this question in other contexts, a more rigorous test plainly would be inappropriate in this case. The Court occasionally has suggested that the government should be held to a higher standard to maintain the credit of public debtors (see *Perry* v. *United States*, 294 U.S. 330, 346-347 (1935); *Lynch* v. *United States*, 292 U.S. 571, 580 (1934)) or when the government's actions are simple attempts to reduce its financial obligations. See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 n.23, 26 & n.25 (1977). See generally *National Railroad Passenger Corp.*, slip op. 20 n.24; *Lynch*, 292 U.S. at 580. Here, in contrast, the government is not attempting to terminate its obligations; to the contrary, it is attempting to *include* a large portion of the workforce in the national insurance system.

nificant numbers * * * for reasons that appear to have more to do with reducing operating costs than providing basic, adequate protection for all employees." *Ibid.* See H.R. Comm. Print 97-34, at 12-13, 15, 16. Conversely, Congress found considerable resentment on the part of covered employees towards that group of state and local government workers who had been in the System long enough to remain eligible for full benefits even after they were withdrawn by their employers. H.R. Rep. 98-25, *supra*, at 19. In these circumstances, the legislative action was, as the Court has remarked in the Contracts Clause context, plainly "appropriate to the public purpose justifying its adoption." *United States Trust Co.*, 431 U.S. at 22.

b. This conclusion is enough to establish that the 1983 modification of Section 418(g) does not implicate the Fifth Amendment. It should be added, however, that the district court also disregarded a second distinct strand of "takings" law that establishes the constitutionality of the challenged legislation.

As this Court repeatedly has noted, "government regulation—by definition—involves the adjustment of rights for the public good." *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979). Thus, at least "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124, 130, 136-138 (1978).[14]

[14] While contract rights are a form of property that may be taken for a public purpose (see, *e.g.*, *United States Trust Co.*, 431 U.S. at 19) the Court generally has inquired only into the rationality of federal legislation impairing the value of contracts (see pages 16-17, *supra*), instead of applying the somewhat more elaborate test spelled out in *Allard* and *Penn Central*. It apparently has done so both to forestall the danger that parties will attempt to "remove their transactions from the reach of dominant constitutional power by making contracts about them" (*Norman*, 294 U.S. at 307-308 (1935)), and because legislation affecting more tangible property interests is more likely to "interfere[] with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124.

Here, state employers retain the principal benefit that led them to enter into Section 418 agreements—participation in the Social Security System. Nothing in the 1983 amendment changed the nature of the ongoing relationship between employers and the federal government. And while termination no longer is possible, it is far from clear that the ability to withdraw from the System was, at any point, a significant part of the attraction of the Section 418 program. To the contrary, the termination provision "receive[d] little attention in the legislative histories of [Social Security Act] amendments since 1939, presumably because it was assumed that once covered, few groups would seek to terminate coverage." H.R. Comm. Print 97-34, at 3. Indeed, in the program's first 13 years only four local government entities, representing a total of 48 employees, withdrew from the System (*id.* at 26); only one state (Alaska) ever has withdrawn its own employees from the System (see *id.* at 1); and the states have made no attempt to withdraw the vast bulk of covered local government employees. In these circumstances, it is difficult to see how the amendment to Section 418(g) violated "the dictates of "'justice and fairness."'" *Allard*, 444 U.S. at 65 (citations omitted).

CONCLUSION

Probable jurisdiction should be noted.
Respectfully submitted.

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SEPTEMBER 1985

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civil S-83-406 LKK

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL., PLAINTIFFS

v.

MARGARET HECKLER, Secretary, Department of Health and Human Services, ET AL., DEFENDANTS

No. Civil S-83-776 LKK

STATE OF CALIFORNIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed May 29, 1985]

ORDER

The above-captioned cases are currently before the court on cross motions for summary judgment, preliminary injunction, and dismissal. The motions are disposed of in this Memorandum and Order.

SYNOPSIS

For several years, many political subdivisions of the State of California ("the public agencies") have voluntarily participated in the Old Age, Survivors, and Disability Insurance Benefits program of the federal Social Security Act. The federal and state statutes governing the public agencies' participation permitted them to withdraw from the program so long as they satisfied certain termination requirements. On April 20, 1983, the Congress amended that portion of the federal statute which permitted the public agencies to withdraw. The public agencies and the State then sued the United States and the administrators of the Social Security program, challenging the constitutionality of the amendment. They argued that the amendment constituted an illegal tax upon the State, and that various constitutional rights of the State, the public agencies and their employees were violated by passage of the 1983 amendment. Those challenges to the amendment are currently before the court.

Among the constitutional arguments proffered, the public agencies allege that the April, 1983 amendment effected a taking of their contract rights without just compensation. In resolving this issue, I am mindful of my duty to construe statutes as constitutional. I am also mindful of the fact that the statute I consider was enacted by Congress as part of a comprehensive package of legislation dealing with the intractable problem of ensuring the financial viability of one of the most important social programs adopted by the federal government. Nonetheless, and no matter with what circumspection a judge approaches the task, under our system it is "emphatically the province and duty of the judicial department to say what

the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

With all the deference to which an act of Congress is entitled, I nonetheless conclude in this opinion that, as against the United States, the public agencies were vested with the contractual right to withdraw from Title II, that this right constitutes "private property" within the meaning of the Just Compensation Clause of the Fifth Amendment, and that this property was taken from them by the United States without the "just compensation" mandated by that clause. I further determine, however, that to award just compensation in this case would frustrate the very purpose Congress had in passing the statute. Accordingly, I find that to comply with the provisions of the Constitution and to honor the evident intent of Congress I must declare the statute unconstitutional and of no effect to the degree that it prevents the State and its public agencies from withdrawing from the program.

Lest this Opinion be read too broadly, I briefly pause to clarify what this case is *not* about. This case does not involve mandatory participation in the Social Security system by the State of California or its public agencies. It may be assumed without deciding, that Congress could force the State and public agencies to provide Title II benefits to their employees, since the welfare of all United States citizens is of concern to the entire nation. *See Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985). It may be assumed (without deciding) that such an imposition might pass constitutional muster even though the Agreement permits the State to withdraw from the *contract*. In such a case, the State's *contractual* right to withdraw would appear

to be unaffected (thus a Just Compensation claim might be avoided), but the termination right would do the State no good since it would then be under a *statutory* obligation to participate in the Program. This is not, however, the situation presented here. In the case before this court, the Congress has specifically divested the State and its public agencies of their contractual right to terminate their participation in the Program; it has further instructed the Secretary to effectuate that divestment by directing her to refuse to accept any otherwise properly tendered notifications of withdrawal. It is to this statutory scheme that the lawsuits are tendered and it is only this question which is addressed.

I

FACTUAL BACKGROUND

Effective January 1, 1951, the State of California ("the State") and the United States executed an agreement ("the Agreement") pursuant to 42 U.S.C. § 418(a)(1) under which the Old Age, Survivors, and Disability Insurance Benefits program of the Social Security Act ("the Program" or "Title II") would be extended to public employees if and when the State and its eligible public agencies chose to include them. (*POSSE* Complaint Exhibit "A"; *CALIFORNIA* Complaint Exhibit "A"). As required by the federal statute in effect at the time the Agreement was executed, the Agreement permitted the State to withdraw any coverage group [1] of its public

[1] For purposes of this case, a "coverage group" is the eligible employees of the plaintiff public agencies. *See* 42 U.S.C. § 418(b)(5)(B) & (D).

employees upon two years' advance notice to the Secretary.

Pursuant to the statute, the Agreement required the State to make certain payments to the United States Treasury to finance its participation, and the participation of its public agencies. The Agreement provided that the State would pay into the United States Treasury, "amounts equivalent to the sum of the taxes which would be imposed under the Federal Insurance Contributions Act." (Agreement, *as amended* April 13, 1955, *CALIFORNIA* Complaint Exhibit "A").

In order to carry out its end of the bargain, the State enacted enabling legislation. *See* Cal. Gov't Code §§ 22000-22603 (West 1980 & Supp. 1985). Pursuant to the Agreement and that legislation, the State entered into individual agreements with those of its public agencies wishing to participate in the Program. The public agencies became enrolled in the program when the State and the United States modified the State/federal agreement to include them. *See* 42 U.S.C. § 418(c)(4). The public agencies were required by the state's enabling legislation to make certain "contributions" to the State as payment for their participation. *See* Cal. Gov't Code § 22551-53 (West 1980 & Supp. 1985). As permitted by that legislation, the public agencies could withdraw from coverage (and concomitant liability to the state), upon two years' advance notice to the State. *See* Cal. Gov't Code § 22310 (West Supp. 1985).

In sum, the United States agreed to enroll any public agency whose participation the State requested, so long as the State paid for the participation. In turn, the State agreed to enroll any public agency which requested it, so long as the public agency re-

imbursed the State for the costs of its participation. In an apparent attempt to avoid getting caught paying for public agencies which had already withdrawn from the Program, the State prohibited the public agencies from withdrawing except on the same terms and conditions (essentially) upon which the State itself could terminate their enrollment. Thus, in effect, the public agencies were permitted to withdraw only if the State could terminate their enrollment, thus ending the State's own liability for the public agencies' participation.

In April of 1983, Congress enacted section 103(a) and (b) of Public Law 98-21 (*see* 42 U.S.C.A. § 418(g) (West Supp. 1985)). This amendment deleted that part of the former statute which permitted the State to terminate the agreement, and to terminate coverage for any set of its public employees. The amendment provided that any state participating at the time of enactment could not withdraw under any circumstances. It also purported to invalidate any notices of withdrawal which had already been filed, but which had yet to go into effect.[2] The State had

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[2] The challenged enactment reads:

(a) Section 218(g) of the Social Security Act [42 U.S.C. § 418(g)] is amended to read as follows:

"Duration of Agreement

"(g) No agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after the date of the enactment of the Social Security Amendments of 1983.".

(b) The amendment made by subsection (a) shall apply to any agreement in effect under section 218 of the Social Security Act on the date of the enactment of this Act [the Social Security Amendments of 1983], without regard to whether a notice of termination is in effect on

already submitted notices of voluntary withdrawal from the Social Security system on behalf of several of its public agencies.

These two related suits were filed to challenge that part of the enactment which prohibited the State from exercising the "escape clause" of the contract and thereby withdrawing from Title II.

II. THE PARTIES

The plaintiffs in *P.O.S.S.E. v. Secretary of H.H.S.* (Civ. S-83-406 LKK) ("POSSE") are several public agencies of the State of California, their employees and local taxpayers, and a group called Public Agencies Opposed to Social Security Entrapment ("POSSE"), who seek declaratory and injunctive relief against the defendant United States, the Secretary of Health and Human Services, and others.

For purposes of these cases, a "public agency" is "any city, county, city and county, district, municipal or public corporation, or any instrumentality thereof." Cal. Gov't Code § 22009 (West Supp. 1985). The original public agency plaintiffs are three Special Districts organized under the laws of California. They are Yorba Linda Library District,[3] North Bakersfield Recreation and Park District,[4] and Delano

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such date, and to any agreement or modification thereof which may become effective under such section 218 after that date.

P.L. 98-21, section 103 (April 20, 1983), 97 Stat. 65, 71-72, *reprinted at* [1] U.S. Code Congr. & Admin. News (98th Congr., 1st Sess., 1983).

[3] Library Districts are public agencies organized under Cal. Educ. Code §§ 19400-19432 (West 1978 & Supp. 1985).

[4] Recreation and Park Districts are public agencies organized under Cal. Pub. Res. Code §§ 5780-5788.13 (West 1984 & Supp. 1985).

Mosquito Abatement District.[5] By order of November 17, 1983, the plaintiffs were granted leave to join additional plaintiffs. The plaintiffs joined were five general law cities,[6] one charter city,[7] and eleven additional Special Districts.[8]

The POSSE plaintiffs name as defendants, the United States and the Secretary and Undersecretary of the federal Department of Health and Human Services. The Secretary is the successor in interest to the original federal signator to the Agreement with the State, and the federal official responsible for implementing Title II. In addition, the plaintiffs name as "Real Parties in Interest," the State of California,

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[5] Mosquito Abatement Districts are public agencies organized under Cal. Health & Safety Code §§ 2200-2360 (West 1979 & Supp. 1985).

[6] A "general law" city is a city "organized under the general law" of the State, and a public agency. Cal. Gov't Code § 34102 (West 1968). The general law cites added were Alturas, Arcata, Lincoln, San Clemente, and San Anselmo.

[7] A "charter" city is a city "organized under a charter." Cal. Gov't Code § 34101 (West 1968). The charter city added was Redondo Beach.

[8] The Special Districts added were: Aromas Tri-County Fire Protection District (*see* Cal. Health & Safety Code §§ 13801-999 (West 1984 & Supp. 1985)); Bear Mountain Recreation and Park District; Big Bear Municipal Water District (*see* Cal. Water Code §§ 71000-3001 (West 1966 & Supp. 1985)); Humboldt Community Services District (*see* Cal. Gov't Code §§ 61000-802 (West 1983 & Supp. 1985)); Marin Municipal Water District; Paradise Irrigation District (*see* Cal. Water Code §§ 20500-9978 (West 1984 & Supp. 1985)); Paradise Recreation and Park District; Pico Water District (*see* Cal. Water Code §§ 34000-8501 (West 1984 & Supp. 1985)); Placential Library District; Ranco Simi Recreation and Park District, and Sispuedes Fire Protection District.

its Governor, the Board and its members, and the State's Director of Finance, all in their official capacities as the entities and officials charged by state law with administering the State's participation in the Title II program. At oral argument, plaintiff explained that the "Real Parties in Interest" were named as defendants.

The sole plaintiff in *California v. United States* is the State of California. It names as defendants, the United States, and the Secretary and Undersecretary of the federal Department of Health and Human Services. All defendants in both actions are referred to, collectively, as "the Secretary."

III. THE CLAIMS & RELIEF SOUGHT

A. *P.O.S.S.E.*

According to the POSSE plaintiffs, the enactment of P.L. 98-21 prevents them from terminating their formerly voluntary participation in the Social Security program. They seek both an injunction to enjoin the Secretary from enforcing the law on the grounds that it is unconstitutional, and a declaratory judgment to that effect. They also seek "specific performance" of the government's contractual obligations.

The public agency POSSE plaintiffs (hereinafter collectively referred to as "the public agencies") predicate their claims upon four constitutional grounds, and what appears to be a suit for breach of contract. The public agencies assert first, that the defendants have deprived them of their "contract rights" without the just compensation required by the Just Compensation Clause of the Fifth Amendment.[9]

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[9] "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. 5.

Second, they assert that the enactment deprives them of their contract rights without the due process of law guaranteed by the Due Process Clause of the Fifth Amendment.[10] They assert as a third ground, that through the challenged enactment, the defendants have attempted to regulate "essential state and local government functions," in violation of the Tenth Amendment.[11] Finally, the public agencies appear to assert that the government has committed a breach of contract for which they seek a remedy in specific performance.

The individual POSSE plaintiffs assert that the defendants have denied them the equal protection of the laws guaranteed by the Due Process Clause of the Fifth Amendment.[12]

B. *The State*

The State seeks to enjoin enforcement of the statute on the grounds that it is unconstitutional, as well as a declaratory judgment of the statute's unconstitutionality. It also seeks relief in the form of mandamus. The State predicates its claims for relief upon

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[10] "No person shall be . . . deprived of life, liberty or property, without due process of law." U.S. CONST. amend. 5.

[11] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. 10.

[12] The Due Process Clause of the Fifth Amendment contains an equal protection component which protects individuals from governmental discrimination so arbitrary that it violates substantive due process. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *United States v. Yazzie*, 693 F.2d 102, 103 n.2 (9th Cir. 1982), *cert. denied*, 459 U.S. 1222 (1983).

two constitutional grounds. It alleges first, that the defendants acted in excess of any powers granted them by the Constitution by (1) breaching their contractual obligations to the State, and (2) impairing the State's ability to structure its relationships with its own public employees. Second, the State alleges that the defendants violated its sovereign rights under the Tenth Amendment by reason of the two acts just enumerated.

IV. SUBJECT MATTER JURISDICTION

The federal defendants move to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(1), asserting a lack of subject matter jurisdiction in this court pursuant to the Anti Injunction and Declaratory Judgment Acts. The defendants argue that this suit seeks to enjoin the collection of federal taxes, and that such actions may not be brought in federal court. *See* I.R.C. § 7421(a); 28 U.S.C. § 2201. The defendants suggest in their papers that some of the plaintiffs lack constitutional standing to assert these claims. *See* Fed. R. Civ. P. 12(h)(3). I turn to the standing issue first.

A. CONSTITUTIONAL STANDING

At the outset, the court is confronted with a problem of the plaintiffs' constitutional standing to challenge the validity of the statute. As noted, the POSSE plaintiffs are public agencies, and their employees and residents within their respective jurisdiction. Yet, by its terms, the statute they challenge appears to abrogate only an agreement between the State and the federal government (assuming *arguendo* that it abrogates any agreement at all). Since the contract alleged to have been breached by the

defendants is a contract with a party other than any of these plaintiffs, the question arises whether the POSSE plaintiffs have a sufficient interest in the Agreement so as to confer upon them "standing" in the constitutional sense, to challenge a federal statute which allegedly abrogates it. Moreover, the "contract rights" allegedly taken by the defendants facially appear to be property only of the State, if indeed they are property at all.[13]

1. *Standards*

a. *Procedural Standards*

Standing is an issue addressed to the allegations of the complaint. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Plainly, the court may not decide the merits of the case in order to decide whether or not it may reach the merits. Therefore, "[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Id.* at 501 (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969)); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979) (quoting *Warth v. Seldin*, 422 U.S. at 501).

b. *Substantive Standards*

This court has had occasion recently to explore at great length the question of standing. *See Sierra*

[13] The defendants do not challenge the State's standing, but the State has not made a Just Compensation claim.

Club v. Watt, —— F. Supp. —— (E.D. Cal. April 18, 1985). The court will not again set out at length its understanding of the law, but will merely summarize it as relevant to the instant case. As noted in *Sierra Club*, standing is composed of two components; one constitutional in dimension, the other prudential.[14] *Warth v. Seldin*, 422 U.S. at 498. The question of constitutional standing is one of "justiciability." *Id.* As such, it goes to the court's Article III power to adjudicate the claims asserted.[15] *Id.*; *Preston v. Heckler*, 734 F.2d 1359, 1363-64 (9th Cir. 1984). The Supreme Court has articulated the relevant inquiry as follows:

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has

[14] The defendant's attack appears to be restricted to the constitutional component.

[15] Article III standing refers to the constitutional limitations imposed upon the federal court's exercise of subject matter jurisdiction. *See Fors v. Lehman*, 741 F.2d 1130, 1132 (9th Cir. 1984) (citing *Allen v. Wright*, 104 S. Ct. 3315 (1984)). The relevant part of Article III reads: "The judicial Power shall extend to all Cases . . . arising under [the] Constitution [and] Laws of the United States; [and] to Controversies to which the United States shall be a Party." U.S. CONST., art. III, § 2. As a result of this constitutional provision, this court does not have jurisdiction over this claim in the absence of a case or controversy; the standing doctrine is one component of their requirement. *Preston v. Heckler*, 734 F.2d 1359, 1363 (9th Cir. 1984).

> "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Warth v. Seldin, 422 U.S. at 498-99 (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *EMI, Ltd. v. Bennett*, 738 F.2d 994, 996 (9th Cir.) (quoting *Joyner v. Mofford*, 706 F.2d 1523, 1526 (9th Cir. 1983)), *cert. denied*, 105 S. Ct. 567 (1984).

In short, "[t]o comply with Article III, the plaintiff must show: (1) a distinct and palpable injury, (2) a causal connection between the injury and the defendant's conduct, and (3) a substantial likelihood that the relief requested will redress the injury." *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1350 (9th Cir. 1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982)).

2. *Resolution of the Standing Issue*

a. *The State*

The State meets the requirements for standing as to both of its claims. Its complaint alleges that the defendants' actions have caused them a "distinct and palpable" injury, to wit, a deprivation of its ability to structure its employment relationships with its public employees which it claims is an infringement on its sovereignty as a state, and a breach of the contract.

Whether the injury to its employment relations is in fact sufficient to permit the State ultimately to prevail is a question which goes to the merits. For standing purposes, it is sufficient that the State alleges a judicially cognizable interest in the preservation of its own sovereignty, and a diminishment of that sovereignty by the alleged interference in its employment relations with its public employees. *But see Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), *overruling National League of Cities v. Usery*, 426 U.S. 833 (1976).

For standing purposes, whether or not the State's own sovereignty is actually infringed by the inability of its public agencies to withdraw from the social security program is not to be challenged in the context of this motion. Rather, this is a question going to the relationships between the state and its public agencies, and thus a question to await a determination on the merits. In California, this turns out to be a difficult inquiry most inappropriate for resolution at this threshold stage. *Cf. Moor v. County of Alameda*, 411 U.S. 693, 717-22 (1973).

The remaining aspects of the State's standing are not challenged, and the court finds that they are not subject to serious attack.

b. *The Public Agencies*

While the public agencies' constitutional standing is more problematic, the court is satisfied that they have standing to assert the Just Compensation claim pressed in their complaint. The only serious challenge to the public agencies' standing arises because it appears that they were not contracting parties to the allegedly breached contract upon which they predicate their Just Compensation claims. Normally, the court would simply assume the allegations of the complaint to be true. *See* § IV(A)(1)(a), *supra*. In these cases, however, the plaintiffs have attached copies of the Agreement to the complaints as Exhibits. Therefore, in resolving the standing issue on

the allegations of the complaint, I may also examine the Agreement itself. *See* Fed. R. Civ. P. 10(c).[16]

i. *Distinct and Palpable Injury*

The public agencies allege that their property is protected by the Just Compensation Clause and was taken by the Secretary without just compensation. If the plaintiffs can prove this, of course, they will have made out a constitutional violation, and thus a "distinct and palpable injury." *See Secretary of State v. Joseph H. Munson Co.*, 104 S. Ct. 2839 (1984). There are three hurdles the plaintiffs must overcome before they can prove this assertion, however. First, can the public agencies possess "private" property for purposes of the Just Compensation Clause?[17] Second, assuming that private property was taken, do the allegations establish that it was property of the public agencies? Finally, have the public agencies properly alleged a "taking" of the property within the meaning of the Just Compensation Clause?

(a) *"Private Property"*

The Just Compensation Clause provides that "private property" may not be taken for a public purpose without just compensation. U. S. Const. amend. 5. May a California *public* agency (a political subdivi-

[16] Exhibits attached to the complaint are parts of the complaint "for all purposes." Fed. R. Civ. P. 10(c). The Agreement is therefore before me for purposes of the standing issue, and the motion to dismiss. *Beneficial Life Insurance Co. v. Knobelauch*, 653 F.2d 393, 395 (9th Cir. 1981) (citing *Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978)).

[17] This is a question of law; its resolution is not dependent upon the allegations of the complaint.

sion of the State) possess "private property" within the meaning of the Just Compensation Clause?[18] Controlling authority establishes that it may. The Clause's reference to "private property" includes the property of local governments. *United States v. 50 Acres*, 105 S. Ct. 451, 456 (1984). *Cf., Standard Oil Co. v. Arizona*, 738 F.2d 1021, 1028-29 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 815 (1985).

Moreover, a taking of that property without just compensation is a "distinct and palpable" constitutional injury to the local government redressable in an action under the Just Compensation Clause; a local government or political subdivision is entitled to just compensation when the United States takes its property. *See 50 Acres*, 105 S. Ct. at 456 & n.15 (quoting *United States v. Carmack*, 329 U.S. 230, 242 (1946)); *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 101 (1893). *Accord, California v. United States*, 395 F.2d 261, 263-64 (9th Cir. 1968); *Washington v. United States*, 214 F.2d 33, 39 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954).

(b) *Property of the Public Agencies*

Separate and apart from the question of whether the public agencies could, as a matter of law, possess private property within the meaning of the Just Com-

[18] The State has expressly disclaimed any reliance upon the Just Compensation Clause of the Fifth Amendment. Moreover, the public agencies have not argued that the taking of the State's property has injured them in any way; they argue only that the taking was of their own property. Therefore, I do not consider the possibility that the statutory amendment took any property of the State without just compensation.

pensation Clause, the complaint must sufficiently allege that the property taken was the public agencies' property, rather than someone else's. *See United States v. City of Pittsburg*, 661 F.2d 783, 786-87 (9th Cir. 1981) (quoting *Warth v. Seldin*, 422 U.S. at 501).[19]

Here, the public agencies allege that a "contract right" of theirs—to terminate participation in Title II—was taken. The problem, as pointed out by the Secretary, is that the contractual right of termination appears to run in favor of the State, not the public agencies. The public agencies counter with the argument that they are third-party beneficiaries of the contract (as demonstrated by the Agreement itself), and thus possess the same contractual rights as the State. Thus, they argue, *they* possess the contractual right which was allegedly taken without just compensation, and therefore, they have standing to assert the claim. Resolution of this question requires an examination of the Agreement and the applicable law of third-party beneficiaries.

Since this case involves a contract between the State and the United States, the first question to be resolved is: what law applies?[20] The general rule is that contracts entered into by the United States pur-

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[19] In *United States v. City of Pittsburg*, 661 F.2d 783 (9th Cir. 1981), the Ninth Circuit held that the City did not have standing to sue for just compensation when the only property allegedly taken belonged to the residents of the City, not the City itself. *Id.* at 786-87.

[20] The question is whether the Agreement executed between the State and the United States creates a contractual property right of termination in the public agencies. I must determine the answer to this question because it is this asserted property right which was allegedly taken by the United States.

suant to authority conferred by federal statute, are governed by federal law.[21] *United States v. Seckinger*, 397 U.S. 203, 209-10 (1970); *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), *cert. denied*, 104 S. Ct. 236 (1983). It is not seriously disputed that the Agreement was entered into pursuant to the authority granted by 42 U.S.C. § 418, and thus the Agreement is governed by federal law. The applicable law is derived from the controlling federal statutes, and, where they are silent, from the "principles of general contract law." *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *Seckinger*, 397 U.S. at 210 (citing *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944)). Since, in this case, the governing federal statute (the Social Security Act) appears to be silent on the questions posed herein, I shall rely exclusively on what are, as best I can tell, the "principles of general contract law."[22]

As a general rule, rights which arise out of contracts with the United States are "property" within the meaning of the Fifth Amendment:

> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.

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[21] The "federal law" referred to is often called "federal common law." *See North Side Lumber Co. v. Block*, 753 F.2d 1482, 14— (9th Cir. 1985).

[22] I note that my *primary* inquiry at this point is not whether the United States committed a breach of contract, but only whether this case involves a contractual property right belonging to the public agencies.

Lynch v. United States, 292 U.S. 571, 579 (1934); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977). The plaintiffs assert that they have rights "arising out of the contract" with the United States because they are either contracting parties, or at least third-party beneficiaries of the Agreement.

It appears to be a general principle of contract law that third-party beneficiaries are possessed of rights arising out of that contract. In particular, they have the contractual right to enforce the contract. *See Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205, 1208 (9th Cir. 1979). *See generally*, Restatement (Second) of Contracts §§ 304, 307 (1981); 4 Corbin, *Contracts* § 779J (1951). This right, arising from the contract, is "property" within the meaning of the Just Compensation Clause of the Fifth Amendment. To get down to basics, "property" is that group of rights which inhere in a person's relation to a physical or intangible thing. *See Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2873-74 (1984) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945)). It follows, therefore, that the rights arising out of a contract are "property" protected by the Fifth Amendment. The Supreme Court has so held. *See Lynch v. United States*, 292 U.S. at 579.

The final question at this stage of the standing inquiry, then, is whether the public agencies are third-party beneficiaries of the Agreement, and in particular, whether they are beneficiaries of the "escape clause." I conclude that they are. Under the general principles of contract law, a person is a third-party beneficiary if he can show that the contract was made for his direct benefit. *Williams*, 608 F.2d at 1208 (citing *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)).

In this case, the Agreement (as required by statute) specifically provides that upon the request of the State, the Title II benefits are extended by the Secretary to the public agencies. The State agrees to pay the United States for the public agencies' participation.[23]

The specific arrangement in this case provided that the public agencies wishing to become participants in Title II were added to an appendix which was made a part of the Agreement. It thus appears that the public agencies became at least third-party beneficiaries[24] of the contract, if not actual contracting parties.

In particular, the public agencies were invested with the contractual right to terminate their participation in Title II when the State gave the Secretary two years advance termination notice.[25] I conclude that the "escape clause" is a contractual right running in favor of the public agencies, because the United States was on notice, both from the Agree-

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[23] Not surprisingly, however, the State recoups its costs by collecting it from the public agencies, pursuant to the enabling legislation.

[24] They would be termed "donee" third party beneficiaries:

> A third party . . . has an enforceable right by reason of a contract made by two others . . . if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract.

Williams v. Fenix & Scisson, Inc., 608 F.2d 1205, 1208 (9th Cir. 1979) (quoting 4 Corbin, *Contracts* § 776 at 18, 19 (1951)).

[25] There are other requirements not at issue here.

ment itself, and the existence of the State's enabling statutes (which were in effect at the time the public agencies were enrolled in the Program) that the State contemplated that the escape clause would run in favor of the public agencies.

The connection between the escape clause and the public agencies in this case is expressly manifested in the enabling legislation. The State, through the legislation, promised the public agencies that it would exercise the escape clause so as to release them from further participation, at their request (and with the requisite notice, etc.). Each time a public agency was enrolled in the Program, therefore, the United States was put on notice that the State would exercise the escape clause on behalf of the public agencies at their request. Under the totality of the circumstances it appears reasonable to conclude that the Agreement "is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract." *Williams*, 608 F.2d at 1208. For all of the above reasons, then, the court determines that the public agencies, as third party beneficiaries, have standing to allege a taking of their contract rights without Just Compensation.

ii. *Causal Connection*

In order to establish their standing to assert the Just Compensation claim, the public agencies' complaint must establish "a causal connection between the injury and the defendant's conduct." I conclude that the plaintiffs' complaint establishes such a connection.

According to the complaint, the Congress' enactment of P.L. 98-21 deprived the public agencies of

their right to withdraw from the Program without just compensation.[26] Subsequently, the Secretary refused to accept or honor validly tendered notifications of termination from the Program. This, I infer from the allegations, effectuated the Secretary's enforcement of the statutory enactment. In order to establish the causal connection, the plaintiffs' complaint must establish that the Congressional action (or the subsequent executive refusal to accept the notifications) actually effected a "taking" of the property by the United States.

The complaint alleges with sufficient specificity, that the contractual right to terminate participation in the program existed prior to the enactment of the statute, and it was taken by the statute. The existence of the right to terminate is plain from the face of the Agreement, which is attached as an exhibit to the public agencies' complaint. Moreover, it is plain from the language of the amending statute that the Congress withdrew the right to terminate (whoever actually possessed the right). The Secretary's substantive dispute with the existence of a "taking" is discussed in the motion for summary judgment.[27]

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[26] The precise description of the type of taking employed does not appear relevant to the present inquiry, but it appears that this would constitute a "legislative taking" of property without just compensation. *See Kirby Forest Industries v. United States*, 104 S. Ct. 2187, 2191 (1984).

[27] The Secretary argues that there was no contract from which rights could arise, and that any rights arising from the contract were not "absolute" rights protected by the Fifth Amendment.

iii. *Redress of the Injury*

Resolution of this action in the public agencies' favor will redress the injury of which they complain. If the right to terminate is returned to them, or if they are somehow justly compensated for its loss, they will no longer have an injury. I conclude that this aspect of the standing inquiry is met by the public agencies.

c. *The Individuals*

The individuals claim that the defendants have denied them the equal protection of the laws. Although it may appear that in fact it is the state law, not the federal action, that has created the unequal protection problem (at least as between California public employees), this is again a question going to the merits. For purposes of the standing inquiry, the court will accept the plaintiffs' allegations as true.

Put another way, these plaintiffs' allegations in the context of the statutory scheme at least arguably tender the question of whether it is federal or state law which has caused the injury of which they complain. Having sustained a purported injury, they have standing to test whether it is the federal statute which is the cause of that injury.

B. RULE 12(B)(1) MOTION TO DISMISS

The defendants move to dismiss this claim on the grounds that pursuant to the Anti Injunction and Declaratory Judgment Acts, this court lacks jurisdiction over the subject matter. According to their argument, the plaintiffs seek an injunction and declaratory judgment against the collection of "taxes."

1. *Standards*

The standards applicable to a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction depend upon whether the motion is addressed to the allegations of the complaint, or to the existence of subject matter jurisdiction in fact. *See Thornhill Publishing Co. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (citing *Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1947)). In this case, the defendants assert that the allegations of the complaint establish the court's lack of jurisdiction. In such a case, this court accords the plaintiffs the same procedural safeguards to which they would be entitled on a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981). The standards for dismissal under Rule 12(b)(6) are well known.

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, the factual allegations of the complaint are accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam). So construed, the court may dismiss the complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spaulding*, 104 S. Ct. 2229, 2233 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

In spite of the deference the court is bound to give to the plaintiffs' allegations, however, it is not proper for the court to assume that "the [pleader] can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors of*

California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983).

2. *Anti Injunction and Declaratory Judgment Acts*

The relevant portion of the Anti Injunction Act prohibits federal or state suits for the purpose of restraining the assessment or collection of any taxes. I.R.C. § 7421(a) [West Supp. 1985].[28] The relevant portion of the Declaratory Judgment Act excludes suits "with respect to Federal taxes" from the class of suits which may be brought under its provisions. 28 U.S.C. § 2201.[29] Thus the threshold question in any determination of the applicability of these statutes is whether they involve a "federal tax" within the intendment of either Act.

According to the defendants, the Declaratory Judgment Act's prohibition " 'indisputably' " applies to the collection of social security taxes, citing *Bob*

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[28] The relevant part of the Anti Injunction Act states:

> Except as provided [elsewhere], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such a person is the person against whom such tax was assessed.

I.R.C. § 7421(a) [West Supp. 1985]. It is established that the Anti Injunction Act deprives the district court of subject matter jurisdiction of any cases within its description. "The object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collections of federal taxes." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962) ("Williams Packing"); *Stonecipher v. Bray*, 653 F.2d 398, 401 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).

[29] *See Williams Packing, supra*, n.2831 [*sic*] (holding § 7421(a) applicable to suit to enjoin collection of social security and unemployment compensation taxes).

Jones University v. Simon, 416 U.S. 725, 741 (1974). The defendants may well be correct,[30] but their assertion assumes the answer to the question. The issue is whether the payments by the State are in fact "federal taxes" (Social Security taxes or otherwise) within the meaning of the Anti Injunction or Declaratory Judgment Acts, not whether such taxes may be the subject of federal lawsuits.

It appears relatively clear that the exaction of money from the State in this case, both prior to and subsequent to the enactment of P.L. 98-21, is not a "tax" within the meaning of the Anti Injunction or Declaratory Judgment Acts. In *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), several states, and others, challenged "a system of monetary exactions in the form of license fees" imposed by the President of the United States pursuant to the purported statutory authority of section 232(b) of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862(b). 426 U.S. at 550-52. The Court squarely held the suits were not barred by the Anti-Injunction Act because the "monetary exactions" were not assessable under the Internal Revenue Codes:

> The Anti-Injunction Act applies to suits brought to restrain assessment of taxes assessable under the Internal Revenue Codes of 1954 and 1939.... The license fees in this case are assessed under neither Code but rather under the statutory authority conferred on the President by the Trade

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[30] My conclusion here would not necessarily affect my consideration of whether the State is paying a "tax" for constitutional purposes.

> Expansion Act of 1962, as amended by the Trade Act of 1974. The fees are therefore not "taxes" within the scope of the Anti-Injunction Act.

426 U.S. at 558 n.9.

In this case, although the "monetary exactions" paid by the State into the United States Treasury are reckoned by reference to provisions of the Internal Revenue Code, they are not assessed pursuant to the Code. Rather, they are assessed pursuant to the Agreement voluntarily entered into between the State and the federal government. Even after the exactions ceased to be voluntary, they are still assessed pursuant either to the now mandatory Agreement, or pursuant to the 1983 Amendment to Title II, 42 U.S.C. § 418(g). In no event are these exactions assessed pursuant to any provision of the Internal Revenue Code. This action therefore is not barred by the Anti Injunction or Declaratory Judgments Acts.[31]

I thus conclude that the actions are not barred by the Anti Injunction or Declaratory Judgment Acts. The court finds that subject matter jurisdiction over these actions is proper pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction).

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[31] In any event, if there is no other means for the plaintiffs to challenge the validity (as opposed to the amount) of their payments to the Treasury, the lawsuit may not be subject to the restriction imposed by the Anti Injunction Act. *South Carolina v. Regan*, 104 S. Ct. 1107 (1984). In the absence of briefing on this issue, the court will not rely upon that proposition. Nevertheless, the court appreciates the highly professional behavior of the United States Attorney in bringing *South Carolina v. Regan* to its attention.

V. THE MOTIONS FOR SUMMARY JUDGMENT

A. *Standards*

The parties have filed cross motions for summary judgment asserting that there are no facts in dispute. Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Poller v. C.B.S.*, 368 U.S. 464, 467 (1962); *Retail Clerks Union Local 648 v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the burden of proof on these issues. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983). In this case, the material facts are undisputed, and only the legal interpretation of those facts is in dispute. The cross motions therefore turn on the applicable law.

B. *Was There a "Taking"*

Because the court resolved in the standing context that the public agencies had a property right in the escape clause, I turn to the next requirement of a Just Compensation Claim; namely, was there a taking? Under the Agreement the public agencies had a right to withdraw; under the amended statute they do not. Nonetheless, defendants argue there was no taking. According to the defendants, 42 U.S.C. § 1304 gives the Secretary the right to alter or amend the Social Security Act no matter what effect any such alterations or amendments might have on the Agreement. That section provides: "The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress." 42 U.S.C. § 1304.

From this language, the defendants appear to argue that there was no contract for them to breach: "Congress obviously did not intend to authorize the Administrator to enter into 'contracts' which would forever preclude Congress from amending Section 218 without the agreement of every state in the nation." (United States' Motion for Summary Judgment at 19).

To the degree that defendant's argument is predicated on the absence of a contract, it simply will not lie. Both sets of plaintiffs have attached to their complaints a writing which purports to be a contract between the State and the federal government. That document evidences an agreement between the parties signatory thereto, that each promises to do certain things and to assume certain obligations. Under any definition of contract, this is a contract. *See, e.g., Woods v. United States*, 724 F.2d 1444, 1449 (9th Cir. 1984) (citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)).[32]

Basing their arguments upon 42 U.S.C. § 1304, the defendants argue that the Congress may amend Title II notwithstanding whatever effect it may have upon the Agreement, because the Agreement implicitly incorporates every law existing at the time and place of execution of the contract, including 42 U.S.C. § 1304, citing *United States Trust Co. v. New*

[32] To the degree that the United States is making an argument that the contract is illusory because, by virtue of section 1304 it is not bound, the argument is just another way of expressing the notion that, section 1304 provides Congress with the power to amend both the law and the contract. Because I dispose of that argument in the text above, I do not consider it separately in the context of the sufficiency of the contract.

Jersey, 431 U.S. 1, 19 n.17 (1977) and *Home Building Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934). As a result, according to the defendants, the Agreement itself contemplates that its terms may unilaterally be changed whenever the Congress chooses to do so. Under this analysis, the defendants conclude that the enactment of P.L. 98-21 was not a repudiation of the contract, but a mere exercise of Congress' right, inherent in the contract itself, to "change" the terms of the Agreement pursuant to § 1304.[33]

Defendants may well be correct that the Congress has the right to amend Title II whenever and however it chooses. *See* 42 U.S.C. § 1304. Nonetheless, the assertion is beside the point. Section 1304 does not authorize Congress to alter or amend the *contract*; it only authorizes the Congress to alter or amend the statute. 42 U.S.C. § 1304. Defendants' argument is predicated upon a failure to separate the terms of the Agreement from the terms of Title II prior to the challenged amendment.

Both the Agreement and the statute provided that the State could withdraw after the giving of two years' advance notice. I assume *arguendo* that Congress would have had the power under § 1304 (or otherwise) to divest the State of its right to withdraw if the right existed solely by virtue of the statute.[34]

[33] Although this argument is raised in another context, if it is correct it may lead to the conclusion that no "taking" occurred.

[34] In *Flemming v. Nestor*, 363 U.S. 603 (1960), for example (cited by the defendants) the Congress had amended Title II to exclude from benefits anyone deported because of membership in the Communist Party. *Id.* at 605. The statute was

In this case, however, the right to withdraw does not exist solely by virtue of the statute. The state's right to terminate draws its independent existence from the plain terms of the contract it executed with the United States. Even if Congress' power to amend the statute is incorporated into the contract, such incorporation does not address the question of whether, when Congress exercises that power, it may deprive the State of its existing contractual rights without compensation. By virtue of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation.[35]

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challenged as unconstitutional. Among other arguments, the plaintiff argued that he had "an accrued property right" to the Social Security benefits, of which the statute unconstitutionally deprived him. Discussing § 1304, the Court held that the Congress had the authority to amend Title II even if it deprived a person of future benefits to which he would otherwise be entitled. *Id.* at 610-11. This was so because the Congress had only terminated a "noncontractual benefit" which existed solely by virtue of the statute. *Id.* at 611. Unlike the Congressional action in *Flemming*, the action complained of herein is the termination or abrogation of a contractual right. The *Flemming* Court expressly limited its holding by noting that the holding did not loose the Congress to "modify the statutory scheme free of all constitutional restraint." *Id.* at 611.

[35] Moreover, under the defendants' own version of the law, the assumption that Congress could freely revoke the right to withdraw so long as that right did not arise out of the contract, may be unjustified. In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Court stated:

> The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement. "This Court has said that 'the laws which subsist at the time and place of the making of a contract,

C. *Just Compensation*

Congress clearly and explicitly intended to deprive the plaintiffs of their right to withdraw from the contract. *See* P.L. 98-21 § 103(a) and (b), 97 Stat. 65, 71-72, *reprinted at* [1] U.S. Code Congr. & Admin. News (98th Congr. 1st Sess., 1983). Moreover, Congress provided no means of compensation for depriving plaintiffs of that right. Ordinarily, under such circumstances plaintiff's remedy is to seek "just compensation," in the Court of Claims rather than a declaration that the action of the Government must be set aside. *Ruckelshaus*, 104 S. Ct. at 2880-83. *Cf. Robinson v. Ariyoshi*, 753 F.2d 1468, 1474-75 (9th Cir. 1985). In this case I am not free simply to order "just compensation" to the plaintiffs, or to refer the case to the Court of Claims, thus possibly saving the statute from a declaration of unconstitutionality. The only rational compensation would be reimbursement by the United States to the State or public agencies, of the amount of money they currently pay to the United States for their participation in Title II, since that seems the only sensible measure of damages.

> and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' ". . . This principle presumes that contracting parties adopt the terms of their bargain *in reliance on the law in effect at the time the agreement is reached.*

Id. at 19 n.17 (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934)) (emphasis added).

The law in effect at the time these parties entered into the Agreement stated that the State could withdraw from the program so long as it gave the defendants two years' advance notice. Therefore, even if the Agreement did not expressly incorporate this law, it was nonetheless implicitly incorporated.

As explicated in the Secretary's Motion for Summary Judgment, the legislative history clearly demonstrates that this statute was passed in order to solve the financial crisis found to exist relative to the social security system. (Federal Motion at 1-16).[36] Its purpose was to ensure an adequate financial basis for that system by requiring the states and their public agencies to contribute to the system. (*Id.*) It simply cannot be doubted that to construe the statute so as to require the United States to pay just compensation by making the contribution for the public agencies is simply and clearly contrary to the will of Congress. While I am under an obligation to construe statutes so as to avoid a finding of unconstitutionality, I may do so only when such a construction is consistent with the will of Congress. *See, e.g., Selective Service System v. Minnesota Public Interest Group*, 104 S. Ct. 3348, 3355 (1984) (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 571 (1973)). Here, the will of Congress cannot be given expression since to do so violates the Just Compensation provision of the Constitution. I must conclude that the Congress acted without constitutional authority when it took the plaintiffs' contractual property right to withdraw from the Agreement without just compensation and that no rational measure of damages may be awarded consistent with Congress' purpose in passing the statute. Congressional action taken without constitutional authority being void,

IT IS HEREBY DECLARED that the challenged Act of Congress, P.L. 98-21, Section 103(a) and (b),

[36] The primary source of legislative history cited by the United States is H.R. Rep. No. 98-25, 98th Cong., 1st Sess. 11 (1983), *reprinted at* 2 U.S. Code Congr. & Admin. News 219-404 (1983).

is void and of no effect as it purports to affect these plaintiffs; and the State of California and its political subdivisions have the lawful right to withdraw from Title II so long as they have met the requirements of the Agreement and the law.[37]

The Secretary of Health and Human Services is hereby ORDERED to accept the notifications of withdrawal properly tendered to her.

The remaining motions are now MOOT.

IT IS SO ORDERED.

DATED: May 24, 1985

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge
United States District Court

[37] This Opinion draws no conclusion as to the validity of the amendments as they affect anyone joining the Program subsequent to their enactment.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Civ S-83-776-LKK

PUBLIC AGENCIES

v.

SECRETARY OF HHS

[Filed May 31, 1985]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered pursuant to the order filed 5-29-85.

J.R. GRINDSTAFF
Clerk

/s/ S. Furstenau
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. Civil S-83-406-LKK

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL., PLAINTIFFS

v.

MARGARET HECKLER, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

No. Civil S-83-776 LKK

STATE OF CALIFORNIA, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed June 27, 1985]

NOTICE OF APPEAL

The defendants United States of America, et al., and Margaret Heckler, Secretary, Department of Health and Human Services, et al., hereby appeal from the final order in the above-captioned case, filed

on May 29, 1985 and entered on May 31, 1985. This appeal is taken to the Supreme Court of the United States pursuant to 28 U.S.C. 1252.

Respectfully submitted,

/s/ M. Susan Carlson
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